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Nos. 98-326 and 98-338

In the Supreme Court of the United States

OCTOBER TERM, 1998

WALTER J. THOMAS, ET AL., PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ODIE N. FIELDS, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in its application of discretionary factors to determine that members of a class, which was certified under Federal Rule of Civil Procedure 23(b)(2), should not be permitted to opt out of a class settlement.

2. Whether petitioners, as named plaintiffs or plaintiff-intervenors, have a special status that bars a court from dismissing their individual claims as part of a global settlement if they object to the terms of the settlement.

3. Whether the court of appeals failed to consider the adequacy of class counsel's representation.

4. Whether the particular settlement agreement reached in this case was fair, adequate, and reasonable.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-326

WALTER J. THOMAS, ET AL., PETITIONERS

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

No. 98-338

ODIE N. FIELDS, PETITIONER

v.

MADELEINE ALBRIGHT, SECRETARY OF STATE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Thomas Pet. App. 1a-19a; Fields Pet. App. 1-25[1]) is reported at 139 F.3d 227. The memorandum opinion and order of the district

[1] "Thomas Pet." refers to the Petition for a Writ of Certiorari filed in No. 98-326, and "Thomas Pet. App." refers to the appendix attached thereto. "Fields Pet." refers to the Petition for a Writ of Certiorari filed in No. 98-338, and "Fields Pet. App." refers to the appendix attached to that petition.

court (Thomas Pet. App. 20a-60a; Fields Pet. App. 29-76) are reported at 169 F.R.D. 224.

JURISDICTION

The court of appeals entered its judgment on March 27, 1998. A petition for rehearing was denied on May 27, 1998. Thomas Pet. App. 61a; Fields Pet. App. 28. The Thomas petition for a writ of certiorari was filed on August 24, 1998, and the Fields petition was filed on August 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal Rule of Civil Procedure 23(b) authorizes the maintenance of three different types of class actions in federal district courts. A class action may be certified under Rule 23(b)(1) if the prosecution of separate lawsuits by each individual member would create a risk of "inconsistent or varying adjudications * * * which would establish incompatible standards of conduct for the party opposing the class," or if the resolution of the individual claims "would as a practical matter be dispositive of the interests of the other members" or would "substantially impair or impede their ability to protect their interests."

A class action may be certified under Rule 23(b)(2) when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Finally, a class action may be certified under Rule 23(b)(3) if "questions of law or fact common to the members of the class predominate over any questions

affecting only individual members" and proceeding by way of a class action is deemed preferable to "other available methods for the fair and efficient adjudication of the controversy." See *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231, 2245-2247 (1997) (analyzing Rule 23's different class certification options). Rule 23(c)(2) expressly provides that individual members of a class certified under Rule 23(b)(3) must be afforded adequate notice of and the opportunity to opt out of the class action. Rule 23, however, makes no provision for excluding individual members of classes certified under (b)(1) or (b)(2).

2. Petitioners are seven current or former African American State Department Foreign Service Officers who alleged race discrimination and unlawful retaliation by the State Department in a variety of personnel practices. In 1986, petitioners filed a class action lawsuit against the State Department under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioners alleged discrimination on the basis of race, both in the form of disparate impact and disparate treatment, in the Department's policies and practices involving assignments, performance appraisals, promotions, tenuring, selection out, and retaliation. Thomas Pet. App. 2a-3a, 21a-22a, 23a.

Petitioners moved for class certification pursuant to Federal Rule of Civil Procedure 23(b)(2). Petitioners alleged that the State Department had acted or refused to act on grounds that were generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Thomas Pet. App. 2a; see also 1 C.A. App. 100 (contending that the case presented "the classic role" for Rule 23(b)(2)).

After lengthy settlement negotiations, the parties entered into a consent decree. Thomas Pet. App. 2a-3a. The parties agreed to seek class certification pursuant to Rule 23(b)(2). *Id.* at 3a. The consent decree was intentionally silent on whether individual class members would be permitted to opt out of the settlement. The consent decree resolved all of petitioners' claims, including attorneys' fees and costs. *Id.* at 3a-4a. The essential features of the agreement are: (1) retroactive promotions, (2) reinstatements, (3) an injunction prohibiting the State Department from discriminating against African American Foreign Service Officers in promotions, assignments, tenuring, and selection out, (4) establishment of a senior-level "Council for Equality in the Workplace" to advance equal employment opportunity and civil rights within the Department, (5) a comprehensive job analysis of Foreign Service Officer job duties and, if appropriate, revision of evaluation forms, (6) revision and expansion of diversity and equal employment opportunity training within the Department, (7) implementation of an approved affirmative action plan consistent with the Equal Employment Opportunity Commission's applicable regulations, (8) creation of a working group to monitor the grant of awards to employees, (9) continued development of an electronic personnel database to monitor employment actions, (10) a duty to report employment information to class counsel for four years, (11) an agreement to undertake efforts to diversify boards reviewing the termination of African American employees, (12) payment of $3.8 million to the class, and (13) payment of $2.1 million in attorneys' fees. See *ibid.* The State Department opposed any opt-outs and, as part of the settlement agreement, attorneys for the class agreed not to advocate a position on the opt-out issue. *Id.* at

4a. The notice of the fairness hearing on the proposed settlement did advise the class members, however, that the district court would decide "whether the right to opt out exists" and that those wishing to pursue opt-out should notify the court of their interest. *Id.* at 65a. Nineteen members initially requested to opt out of the class. *Id.* at 5a.

Following the fairness hearing, the district court entered a final order in which it approved the consent decree, but also allowed the members of the class who previously had expressed an interest in opting out to do so. Thomas Pet. App. 59a-60a. Ultimately, only nine members, out of a class of approximately 360, requested to opt out of the settlement. *Id.* at 5a.

3. The parties cross-appealed. The petitioners appealed the district court's approval of the consent decree. The government objected to the district court's decision to permit opt-outs, on the ground that this Court's decision in *Amchem Products, Inc.* v. *Windsor*, *supra*, barred judicial amendment of Rule 23's textual limitation of opt-outs to (b)(3) class actions.

The court of appeals affirmed the district court's decision approving the consent decree, finding that the settlement was "eminently fair and reasonable to the class as a whole." Thomas Pet. App. 6a. The court carefully evaluated the terms of the settlement in light of the strength of the plaintiffs' claims. *Id.* at 6a-11a. In particular, the court noted that a settlement can be fair even though a significant portion of the class and some of the named plaintiffs object to it. *Id.* at 10a.

With respect to the issue of opt-outs, the court of appeals reversed. The court of appeals agreed with petitioners that Rule 23(b) is sufficiently flexible to afford district courts the discretion to grant opt-out rights in Rule 23(b)(2) class actions. Thomas Pet. App.

14a (citing *Eubanks* v. *Billington*, 110 F.3d 87 (D.C. Cir. 1997)). Specifically, the court ruled that Rule 23(d)(5), which authorizes courts to make "appropriate orders" to govern procedural matters, "is broad enough * * * to permit the district court to provide for opt-outs when appropriate in * * * (b)(2) class actions." *Ibid.* The court nevertheless concluded that the district court abused its discretion in permitting opt-outs in this case because (i) the assumption of cohesiveness underlying the Rule 23(b)(2) certification was not undercut by the individual claims for money damages, *id.* at 16a-17a, and (ii) the claims of the class members who sought to opt out were not "so atypical of the claims of the class as to justify permitting them to opt out," *id.* at 17a.

ARGUMENT

The questions for which petitioners seek this Court's review either were resolved in petitioners' favor by the court of appeals or present fact-bound determinations about which there is no conflict in the circuits. Accordingly, this Court's review is not warranted.

1. Petitioners contend (Thomas Pet. 5-10; Fields Pet. 15-17) that this Court should grant a writ of certiorari to review whether the court of appeals erred in determining that the class was not "akin to a Fed. R. Civ. P. 23(b)(3) class action" (Thomas Pet. i, Question 1) and that no other discretionary factors warranted the authorization of opt-outs in this case (Thomas Pet. i; Fields Pet. i). That case-specific and record-bound determination does not warrant this Court's review.

a. As an initial matter, the petition does not present the broad question of whether courts may ever permit opt-outs in Rule 23(b)(2) class actions. Both the district court and the court of appeals agreed with petitioners that courts have such discretion. See Thomas Pet. App.

11a-15a; Fields Pet. App. 13-18; see also Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9. Because the court of appeals (and the district court) adopted petitioners' arguments in this regard, petitioners are ill-positioned to seek this Court's review of that favorable ruling. Cf. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980).[2]

Nor do petitioners contend that they have an absolute right to opt out of a Rule 23(b)(2) class action. They advance no such argument in their petitions here and made no such argument below; and both the district court and the court of appeals predicated their rulings on the application of discretionary factors. See Thomas Pet. App. 11a-15a, 54a-57a; Fields Pet. App. 13-18, 72-75; see also Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9. Nor are we aware of any court of appeals' ruling that has recognized an absolute right to opt out in the Rule 23(b)(2) context.

b. Because the court of appeals applied the very discretionary standard that petitioners advocated, petitioners simply seek this Court's review of the court of appeals' application of that standard to the particular facts of their case. That claim presents no question of broad or enduring importance; it seeks only the correction of alleged error, which does not customarily warrant this Court's review. See *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981). Indeed, the determination by the court of appeals (Thomas Pet. App. 16a-17a; Fields Pet.

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[2] Although petitioners (Thomas Pet. 5-10; Fields Pet. 16-17) invoke the Due Process Clause before this Court, U.S. Const. Amend. V, that argument made no appearance in petitioners' court of appeals briefs, which acknowledged the discretionary limitations on the right to opt out. See Thomas C.A. Br. 20-25; Thomas C.A. Reply Br. 6-9.

App. 18-20) that claims for money damages neither predominated in the present litigation nor undercut the cohesiveness of the class, so as to make the class "more akin to a Fed. R. Civ. P. 23(b)(3) class action" (Thomas Pet. i, Question 1), is a record-specific determination, the resolution of which would offer little practical guidance to other courts' disposition of other cases. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). Similarly, the court's conclusion (Thomas Pet. App. 17a-19a; Fields Pet. App. 20-23) that petitioners' monetary claims are not unique or atypical, so as to justify permitting them to opt out and thus obtain a dispensation different from other class members, is a factual determination that does not merit further review.

Moreover, the court of appeals' application of a standard that limits opt-outs under Rule 23(b)(2) to instances where either individual claims for money damages are sufficiently substantial to affect the cohesiveness of the class, or the individual's claims or injuries are atypical, is consistent with the decisions of other circuits. See, *e.g.*, *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (due process requires opt out in Rule 23(b)(2) action where "substantial" money damages are at issue) (emphasis omitted), cert. dismissed, 511 U.S. 117 (1994); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F.2d 1295, 1302-1305 (2d Cir. 1990) ("courts have narrow discretionary power to allow [opt-outs]" in actions certified under Rule 23(b)(1)); *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.) (Rule 23(b)(2) class members have no automatic right to opt out, but district court may grant opt-out as a matter of discretion), cert. denied, 479 U.S. 883 (1986); *Holmes* v. *Continental Can Co.*, 706 F.2d

1144, 1151-1160 (11th Cir. 1983) (opt-out permitted in class action certified under Rule 23(b)(2) where money damages claims undercut cohesiveness of the class and made it more analogous to a Rule 23(b)(3) class); *Laskey* v. *International Union, United Auto., Aerospace & Agric. Implement Workers*, 638 F.2d 954, 956-957 (6th Cir. 1981) (no automatic right to opt out under Rule 23(b)(2) and, under circumstances of the case, due process did not require opt-out); *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 506-507 & n.10 (5th Cir. 1981) (opt-outs under Rule 23(b)(2) are permissible, in exercise of district court's discretion, but are not mandatory). Furthermore, the factors that courts of appeals consider in determining whether to permit opt-outs largely coincide. See, *e.g.*, *Brown*, 982 F.2d at 392; *Long Island Lighting*, 907 F.2d at 1302-1305; *Cox*, 784 F.2d at 1554; *Holmes*, 706 F.2d at 1151-1160; *Kincade*, 635 F.2d at 506-507 & n.10 (all—focusing on effect of individual claims on class cohesiveness, class's similarity to a Rule 23(b)(3) class, or the unique facts and circumstances of particular claims). Any minor deviations in the articulation of the opt-out standard would not be of sufficient practical import to warrant this Court's review.

c. Contrary to petitioners' contention (Thomas Pet. 10; Fields Pet. 17), this case does not pose the question presented, but not decided, in *Adams* v. *Robertson*, 117 S. Ct. 1028 (1997) (per curiam), and *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam). The issue in those cases was whether due process required the opportunity to opt out of a Rule 23(b)(1) or (2) class action that "involved primarily money damages claims." *Ticor*, 511 U.S. at 120 (emphasis omitted); see also *Adams*, 117 S. Ct. at 1029 (action "primarily involving claims for monetary relief"). This case, by contrast,

involves "predominantly equitable claims." Thomas Pet. App. 16a, 44a-45a. The district court found, and the court of appeals agreed, that "the plaintiffs sought extensive injunctive and systemic relief in addition to monetary damages," in an effort to correct "a system of personnel actions that have been uniformly imposed on all class members." *Id.* at 16a (quoting district court opinion) (internal quotation marks omitted). The bulk of the consent decree's provisions, moreover, addressed changes in State Department personnel practices and equitable reinstatements and promotions, rather than monetary compensation for class members. See *id.* at 3a-4a.[3]

d. Review is also not appropriate because the court of appeals' judgment that opt-outs should not be permitted was correct. *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 626 n.11 (1986) (opinion of Stevens, J.) (the Court "reviews judgments, not opinions"). In *Amchem Products, Inc.* v. *Windsor*, 117 S. Ct. 2231 (1997), this Court held that the class certification criteria established in Rule 23 must generally be adhered to, even when a class is being certified solely for purposes of settlement. *Id.* at 2248-2249. In so holding, the Court cautioned that, when applying Rule 23,

> courts must be mindful that the rule as now composed sets the requirements they are bound to

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[3] For the same reason, petitioners' argument (Thomas Pet. 8; Fields Pet. 17) that the decision to deny opt-outs in a Rule 23(b)(2) action is contrary to *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), is incorrect. *Shutts* "[wa]s limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3. The Court specifically stated that it "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." *Id.* at 811-812 n.3.

> enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered.

Amchem, 117 S. Ct. at 2248 (citations omitted).

The text of Rule 23 plainly authorizes opt-outs only for classes certified under Rule 23(b)(3). No opt-out procedure is authorized for Rule 23(b)(2) (or Rule 23(b)(1)) classes. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974). Petitioners' effort to craft an opt-out provision for Rule 23(b)(2) class members thus would substitute "a rule outside the process Congress ordered" for "the rule as now composed," which is contrary to *Amchem*, 117 S. Ct. at 2248. Cf. *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act," courts must "presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Because Rule 23 does not provide for opt-outs in (b)(2) class actions, as it specifically does in (b)(3) class actions, the court of appeals' judgment denying petitioners the right to opt out of this settlement was correct, and further review is not warranted.[4]

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[4] This Court's decision in *Amchem Prods., Inc.* v. *Windsor*, *supra*, further undercuts petitioners' claims of an inter-circuit conflict because all of the cases upon which they rely pre-date that ruling.

2. The Thomas petitioners also argue (Thomas Pet. 10-13) that the court of appeals erred in approving a settlement that dismissed their individual claims without their consent. They assert that the court of appeals' decision is "in conflict with" (Thomas Pet. 11) *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1984), and that their special status as named plaintiffs or plaintiff-intervenors required individualized consent before their claims could be dismissed (Thomas Pet. 12-13). That claim does not merit this Court's review.

Cooper decided only that, under traditional principles of res judicata and collateral estoppel, individual discriminatory treatment actions could be prosecuted after a class action had been dismissed for failure to prove that the employer engaged in a general, class-wide pattern or practice of racial discrimination. 467 U.S. at 875-881. *Cooper* thus has no bearing on the present case where, as a result of a global settlement, petitioners' individual claims were resolved and petitioners' only objection is to the amount of their recovery. See Thomas Pet. App. 17a ("[Petitioners] argue merely that they stand to be undercompensated for their injuries.").

Petitioners' reliance (Thomas Pet. 11-13; Fields Pet. 13) on *Mandujano* v. *Basic Vegetable Prods., Inc.*, 541 F.2d 832 (9th Cir. 1976); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); and *Ficalora* v. *Lockheed Calif. Co.*, 751 F.2d 995 (9th Cir. 1985) (per curiam), is similarly misplaced. Those cases held only that, when approving class action settlements, district courts must afford careful consideration to the objections raised by the named plaintiffs, while keeping in mind the best interests of the class as a whole. *Ficalora*, 751 F.2d at 996-997; *Pettway*, 576 F.2d at 1214-1217; *Mandujano*, 541 F.2d at 835. The district court and court of appeals

here did precisely that. Thomas Pet. App. 10a, 53a ("Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration."). The court's ruling thus comports, rather than conflicts, with the decisions of those other circuits, making this Court's review unnecessary.[5]

Petitioners also contend (Thomas Pet. 12-13) that *Deposit Guaranty National Bank* v. *Roper*, *supra*, demonstrates that named plaintiffs have special rights in class action cases. *Deposit Guaranty*, however, decided only that a named plaintiff can appeal a denial of class certification even after his individual claim has been satisfied. 445 U.S. at 332-340. *Deposit Guaranty* is thus of no help to petitioners.

3. Petitioners argue (Thomas Pet. 13-14) that the court of appeals erred in failing to consider whether the agreement of class counsel not to take a position on the opt-out issue deprived the class of adequate representation, as required by Rule 23(a)(4). That argument is meritless. The court of appeals separately reviewed counsels' decision to advise class members that they could petition the court to opt out, but not otherwise to litigate the issue (see Thomas Pet. App. 65a, 178a). The court specifically concluded that counsels' limited posi-

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[5] Petitioners seem largely to object to the differences between the methods for resolving individual and class action lawsuits. It is petitioners, however, who elected to pursue their claims through the vehicle of a class action and enjoyed the "substantial advantages" that can accrue from such a procedure. *Deposit Guaranty*, 445 U.S. at 338. As named plaintiffs, moreover, petitioners had an enhanced opportunity to frame and manage the conduct of the litigation from the outset, including the choice to seek certification under Rule 23(b)(2) rather than (b)(3).

tion on the opt-out issue represented, not collusion, but a permissible compromise necessary to reach closure on one provision of the consent decree. *Id.* at 11a ("counsel more than adequately represented the class as a whole" and "[t]he letter agreement [on opt outs] * * * was part of [the] global compromise between the parties"). In any event, such a fact-specific claim is not of sufficiently broad or enduring importance to merit this Court's review.

4. Lastly, petitioner Fields seeks this Court's review (Fields Pet. i, Question 2) of whether the settlement was fair and reasonable to the class as a whole. That record-specific and fact-intensive claim presents no question of broad or prospective significance that would merit this Court's review. See *Sumner*, 449 U.S. at 543. Such review is particularly unjustified where, as here, the district court and the court of appeals both agreed in their assessment of the record and their application of the proper legal standard to it. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), adhered to on reh'g, 339 U.S. 605 (1950); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).[6]

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[6] Petitioner Fields also argues (Fields Pet. i, Question 3) that the State Department continues to engage in discrimination. Pursuant to the terms of the consent decree, the district court retains jurisdiction over implementation of the consent decree for four years. See Thomas Pet. App. 107a. Accordingly, the proper forum for that aspect of petitioner Fields' complaint is the district court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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